DEPARTMENT OF STATE REVENUE

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LETTER OF FINDINGS NUMBER: 92-0958 CS
CONTROLLED SUBSTANCE EXCISE TAX
FOR TAX YEAR 1992

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Controlled Substance Excise Tax — Imposition

Authority: IC 6-7-3-5; IC 6-7-3-6; IC 6-7-3-11; IC 6-7-3-13; IC 35-48-1-9; IC 35-48-2-4; Clifft v. Indiana Dept. of State Revenue, 660 N.E.2d 310 (Ind. 1995) at 313, Bryant v. State, 660 N.E.2d 290 (Ind. 1995)

Taxpayer protests the imposition of the controlled substance excise tax on his possession of marijuana.

STATEMENT OF FACTS

Taxpayer was arrested on September 10, 1992 for possession of marijuana in Orange County, Indiana. On September 24, 1992, a jeopardy assessment of the Controlled Substance Excise Tax (CSET) with the base tax amount of $63,504.00 was delivered to taxpayer. The Department received the taxpayer's protest of the jeopardy assessment on November 23, 1992. Additional facts will be provided below, as necessary.

I. Controlled Substance Excise Tax — Imposition

DISCUSSION

Indiana Code section 6-7-3-5 states:

The controlled substance excise tax is imposed on controlled substances that are:

(1) delivered;
(2) possessed; or
(3) manufactured;

in Indiana in violation of IC 35-48-4 or 21 U.S.C. 841 through 21 U.S.C. 852. The tax does not apply to a controlled substance that is distributed, manufactured, or dispensed by a person registered under IC 35-48-3.

The Department assessed the CSET against the taxpayer upon his arrest for possession of marijuana. Taxpayer was arrested while on the U.S. Forest Service Property in Orange County, Indiana. The police report on file states taxpayer was observed entering a patch of marijuana plants and proceeded to pull plants from the ground and attempted to remove them from the area. Upon taxpayer's arrest, the marijuana plants were seized as evidence.

An activity report, prepared by a departmental Special Agent and dated September 14, 1992, states the evidence was weighed, in his presence, by another departmental Special Agent. The department prepared a CSET assessment on 1,587.6 grams of marijuana and delivered the assessment to the taxpayer on September 24, 1992. A departmental Special Agent also prepared a Controlled Substance Excise Tax Weight Workpaper, dated September 14, 1992, in which he witnessed the field testing and weighing of the evidence by a local law enforcement officer.

Taxpayer protests the assessment being based on 1,587.6 grams of marijuana. Taxpayer offers an Indiana State Police Report of Laboratory Examination in which only 338.54 grams of marijuana were weighed and identified. However, the Department is satisfied the evidence was correctly weighed and identified by two individual law enforcement officers prior to a portion of the evidence being sent to the state police laboratory for further identification and weighing.

Taxpayer further protests the imposition of the CSET on several alternative grounds, a number of which will be addressed below. A non-exhaustive list of these arguments includes:

- the CSET violates double jeopardy,
- the CSET is vague in that it fails to distinguish between pure and impure substances,
- marijuana does not meet the definition of a controlled substance,
- the CSET constitutes cruel and unusual punishment, and
- the CSET is unconstitutional exercise of police power under the guise of tax.

The Indiana Supreme Court addressed many of taxpayer's concerns in a series of cases heard in December, 1995. The Court held, "the CSET is a punishment and thus a jeopardy for double jeopardy purposes which attaches at the moment of assessment." As the CSET jeopardy attaches at the time of assessment, it is the first jeopardy. Any criminal prosecution or conviction of taxpayer would be a second or subsequent jeopardy (jeopardy attaches when the jury is impaneled and sworn) and, therefore, in violation of the Double Jeopardy Clause. Clifft v. Indiana Dept. of State Revenue, 660 N.E.2d 310 (Ind. 1995) at 313, Bryant v. State, 660 N.E.2d 290 (Ind. 1995). Accordingly, the

Court ruled the CSET does not violate double jeopardy.

The taxpayer's argument that the CSET is vague in that it fails to distinguish between pure and impure substances also fails. Pursuant to IC 6-7-3-6:

(a) The amount of the controlled substance excise tax is determined by:

(1) the weight of the controlled substance...

(c) A gram of a controlled substance is measured by the *weight of the substance in possession whether pure, impure, or diluted*. A quantity of a controlled substance is diluted if the substance consists of a detectable quantity of pure controlled substance and any excipient, fillers, or waste. Emphasis added.

The Department is satisfied the marijuana in evidence was correctly weighed in the form in which it was seized, whether pure or impure.

Taxpayer also argues marijuana does not meet the definition of a controlled substance. However, pursuant to IC 35-48-1-9:

Controlled substance means a drug, substance, or immediate precursor in schedule I, II, III, IV, or V under:

(1) IC 35-48-2-4...

IC 35-48-2-4 lists the substances included in schedule I. IC 35-48-2-4(d)(14) specifically lists marijuana.

Finally, the Department is given the authority to assess the CSET and penalty pursuant to IC §§ 6-7-3-5 (imposition of tax), 6-7-3-11 (100% penalty), and 6-7-3-13 (action to collect).

FINDING

For all of the above-stated reasons, taxpayer's protest is denied.